IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

FRIDAY, THE 7TH DECEMBER 2007 / 16TH AGRAHAYANA 1929

SA.No. 610 of 1993()

AS.14/1987 of SUB COURT, TIRUR
OS.11/1977 of MUNI-MAGI.COURT,PONNANI
.....
APPELLANT: (APPELLANT- PLLAINTIFF)

THACHU NAIR, SON OF LAKSHMI AMMA,
PANDARATHIL, KOLALAMBA AMSOM,
POOKKARATHARA DESOM, PONNANI TALUK.

*** ADDL. 2ND APPELLANT:- BALAKRISHNAN V.T.,**
S/O. THACHU NAIR, AGED 47, PADMALAYAM,
POOKKARATHARA, EDAPPAL.

ADDL. 3RD APPELLANT:- SIVADASAN,
S/O. THACHU NAIR, AGED 36, PADMALAYAM,
POOKKARATHARA, EDAPPAL.

BY ADV. SRI.DINESH R.SHENOI
SRI.T.K.VENUGOPALAN

RESPONDENTS: (RESPONDENTS – DEFENDANTS)

***1. ITHUKUTTY AMMA, DAUGHTER OF**
LAKSHMI AMMA, PANDARATHIL KOLALAMBA AMSOM,
POOKKARATHARA DESOM, PONNANI TALUK (DIED)

***2. PARUKUTTY AMMA, DAUGHTER OF LAKSHMI AMMA,**
DO. DO.(DIED).

***3. CHINNAMMU AMMA, D/O. LAKSHMI AMMA,**
DO. DO. (DIED)

*** IT IS RECORDED THAT IST RESPONDENT DIED AND 4TH RESPONDENT IS THE LR'S OF DECEASED IST RESPONDENT.**

R2 DIED AND R5 TO R8 ARE LR'S DECEASED 2ND RESPONDENT AND R3 DIED AND R11 TO R14 ARE LR'S OF DECEASED 3RD RESPONDENT AS PER ORDER DT. 21.11.07 ON MEMO C.F. 5682/07.

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4. VIJAYALAKSHMI AMMA, D/O. ITHUKUTTY AMMA, DO. DO.

5. RADHABAI AMMA, DAUGHTER OF PARUKUTTY AMMA DO. DO.

6. ARAVINDAKSHAN NAIR, SON OF PARUKUTTY AMMA, DO. DO.

7. HARIDASAN NAIR, SON OF DO. DO.

8. RAVEENDRANATHAN NAIR, DO. DO.

9. DEVAN S/O. RADHABAI AMMA, DO. DO.

10. MINI, DAUGHTER OF RADHABAI AMMA, DO. DO.

11. DIVAKARAN NAIR, S/O. CHINNAMMU AMMA DO. DO.

12. KAMALA DEVI AMMA, DAUGHTER OF CHINNAMMU AMMA DO. DO.

13. RAJENDRAN, SON OF CHINNAMMU AMMA, DO. DO.

14. SURESH KUMAR, SON OF CHINNAMMU AMMA DO. DO.

15. BINDU, D/O. KAMALA DEVI AMMA, DO. DO.

16. LEELA, D/O. NARAYANIKUTTY AMMA, DO. DO.

17. LATHA, D/O. NARAYANIKUTTY AMMA, DO. DO.

18. MEENAKSHIKUTTY AMMA, DAUGHTER OF NANIKUTTY AMMA, DO. DO.

19. CHANDRAMATHY AMMA, DO. DO.

20. DAMODARAN NAIR, SON OF DO. DO.

21. VENUGOPALAN NAIR, S/O. DO. DO.

***22. DEVAKI NISSIAR, WIFE OF KRISHNAN NAIR, KOZHUKKOLI CHOVVATT, KOLALAMBA AMSOM, POOKKARATHARA DESOM, PONNANI TALUK (DIED)**

IT IS RECORDED THAT R23 IS THE LEGAL REPRESENTATIVES OF DECEASED R22 AS PER ORDER DT. 28.11.07 (VIDE S.A.)

23. RADHAKIRSHNAN, SON OF DEVAKI NISSIAR, DO. DO.

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24. K.UNNI MAYAMMA, D/O. KOLANGARA KAVUMATHIL KOCHUKUTTY AMMA, ALIAS KUMMINI AMMA, KOLALAMBA AMSOM, POOKKARATHARA DESOM, PONNANI TALUK.

25. K.PARUKUTTY AMMA, DAUGHTER OF KOLANGARA, KAVUMATHIL KOCHUKUTTY AMMA ALIAS KUMMINI AMMA, ENKAKKAD, VADAKKANCHERY P.O.

26. RAJEEV, SON OF MOOPPIL VIDE THANKAMMA AMMA, TRICHUR AMSOM TRICHUR TALUK.

27. MEENAKSHI DEVAKI DAUGHTER OF MOOPPIL VIDE THANKAMMA AMMA, TRICHUR AMSOM, TRICHUR TALUK.

28. RAJESH SON OF MOOPPIL VIDE THANKAMMA DO. DO.

29. SAROJINI AMMA, W/O. KESAVAN NAIR, PILAKKAL DO. DO.

30. RAJAN, SON OF SAROJINI AMMA, PILAKKAL TRICHUR P.O.

31. AMBIKA, DAUGHTER OF DO. DO.

32. KRISHNAKUMAR, SON OF DO. DO.

33. LALITHA, DAUGHTER OF DO. DO.

34. RAMU, SON OF DO. DO.

35. CHITHRA, DAUGHTER OF DO. DO.

36. DEVADAS, DAUGHTER OF DO. DO.

37. SUDHA, DAUGHTER OF DO. DO.

38. SUNILKUMAR, SON OF DO. DO.

39. SAJITHA, DAUGHTER OF DO. DO.

ADDL. R40 AND R41 IMPLEADED.

40. SIVADASAN , S/O. THACHU NAIR, AGED 38, NOW RESIDING AT PB. 5271, SHARJAH, UAE.

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**41. HARIDASAN, S/O. THACHU NAIR, AGED 28,
NOW RESIDING AT P.B. NO. 15594, MANAMA,
BAHRAIN.**

*** ADDL. APPELLANT 2 AND 3 AND ADDL. RESPONDENTS 40 & 41 ARE IMPLEADED AS THE LEGAL REPRESENTATIVES OF THE DECEASED SOLE APPELLANT AS PER ORDER DT. 21.11.2000 ON CMP. 2116/2000.**

**BY ADV. SRI.V.G.ARUN -R18, R19, R20, R21.
SRI.B.JAYASANKAR - R5, R9
SRI.P.VISWANATHAN – R11, R14, R17.
SRI.SHIBU JOSEPH - R 25, R29 TO R39.**

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 07/12/2007, ALONG WITH SA NO. 109 OF 1994 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

tss

M.SASIDHARAN NAMBIAR, J.

.....

S.A.No. 610 of 1993 &
S.A. No.109 OF 1994

.....

DATED THIS THE 7TH DAY OF DECEMBER, 2007

JUDGMENT

Appellant in S.A.610 of 1993 filed O.S.11 of 1977 seeking partition and separation of his share in the plaint schedule property which consists of two taks in R.S.143/1 and 2 of Pololambu Village. Admittedly these items of property were kept common under partition deed of 1930. Plaintiff contended that plaint schedule property was possessed and administered by the Karanavan of the tarwad and Krishnan Nair was the Karanavan of the tarwad of the plaintiff and his wife Nanikuttyamma and children were also lviing with Krishnan Nair and Krishnan Nair died and defendants 20 to 24 are the legal heirs of Krishnan Nair and the plaint schedule properties are available for partition and are in the joint possession and enjoyment of co-owners and therefore plaintiff is entitled to get one out of 21 shares. On the death of first defendant, defendants 27 to 30 were impleaded as legal heirs. Defendants 2 to 9 in their written statement supported the case of plaintiff and sought their share. Defendants 25 and 26 also filed a common

written statement admitting the case of plaintiff. 28th defendant filed a written statement claiming that he is the only legal heir and is entitled to the share of first defendant. Defendants 20 to 24 resisted the suit contending that plaint schedule properties are not available for partition. It was contended that tak No.1 of the plaint schedule property was obtained under Ext.B2 lease by Nanikuttyamma, the mother, from Ravunni Nair the then Karanavan of the tarwad of the plaintiff and tak No.2 was obtained on oral lease from the then Karanavan Kakunni Nair and since then Nanikuttyamma has been in possession of the plaint schedule properties and subsequent to her death, they are in the possession of defendants 20 to 24 and they are entitled to the protection of Kerala Land Reforms Act (hereinafter referred to as the 'Act') and they filed O.A.4469 of 1976 and O.A.10198 of 1976 and Land Tribunal upheld the claim of tenancy and suit is therefore to be dismissed.

2. The suit was originally dismissed by trial court which was challenged in A.S.20 of 1991. First appellate court remanded the suit for fresh disposal after raising all necessary issues. In view of the claim of tenancy raised by defendants 20 to 24, trial court referred the question of tenancy to Land Tribunal, Ponnani

under Section 125(3) of the Act. Before the Land Tribunal, plaintiff was examined as PW1. On the side of contesting defendants, who claimed tenancy, Dws 1 and 2 were examined and Exts.A1 to A9 and B1 to B6 were marked. Land Tribunal, on the evidence found that defendants 20 to 24 are lessees of plaint schedule properties and they are entitlted to fixity of tenure. On receipt of the finding of the Land Tribunal, learned Munsiff accepting the said finding, as he is bound to under Section 125 (5) of the Act, dismissed the suit. Plaintiff challenged the judgment before Sub Court, Tirur in A.S.14 of 1987. Learned Sub Judge, on reappreciation of evidence found that tenancy in respect of Tak No.1 was claimed under Ext.B2, a registered document of 1937 and accepting the evidence that Nanikuttyamma was in possession of the property, since the date of Ext.B2, found that though under Ext.A1 there is a prohibition against alienation of plaint schedule property and so the lease granted under Ext.B2 in favour of Nanikutty Amma is by an incompetent person, under Section 7(B) contesting defendants are entitled to the protection of the Act as they are deemed tenants and confirmed the finding of Land Tribunal and the trial court with regard to tak No.1. It was held that it is not available

for partition. First appellate court also found that in respect of tak No.2, the lease alleged is an oral lease and no satisfactory evidence was adduced to prove the oral lease and therefore defendants 20 to 24 are not entitled to the tenancy right and tak No.2 is available for partition. A preliminary decree was passed holding that tak No.2 is available for partition and it is to be divided into 21 equal shares and defendants 2 to 19 are entitled to one share each, defendants 20 to 26 together are entitled to 1/21 share and defendants 27 to 30 together are entitled to 1/21 shares and respondents 17 and 18 in the appeal are entitled to the share of deceased 3rd defendant and defendants 32 and respondent No.42 are entitled to the share of deceased 28th defendant.

3. Dissatisfied with the finding of non availability of tak No.1, plaintiff has filed S.A.610 of 1993. Dissatisfied with the finding that tak No.2 is available for partition, defendants 20 to 24 have filed S.A.109 of 1994. On the death of appellant, his legal heirs were impleaded in S.A.610 of 1993 as additional appellants and respondents 40 and 41. On the death of respondents 1, 2, 3 and 22, respondents 4, 5 to 8, 11 to 14 and respondent No.23 respectively were recorded as their legal heirs.

Similarly legal heirs were impleaded in S.A.109 of 1994 also.

4. Second appeals were admitted formulating the following substantial questions of law.

1) Whether on the facts and circumstances of the case, defendants 20 to 24 are entitled to the benefit of Section 7(B) of Kerala Land Reforms Act, when Ext.B2 is hit by the provisions of Section 3(VI) of Kerala Land Reforms Act.

2)Whether creation of a lease against the provisions prohibiting such alienations under Ext.A1, is binding on the members of the tarwad or tarwad properties.

3)Whether on the facts and circumstances of the case, Ext.B2 lease deed is valid and binding.

4)When defendants 20 to 24 and their predecessor Nanikutty Amma have been in possession of tak No.2 of the plaint schedule property, immediately before 21.1.1961, whether they are entitled to tenancy right by virtue of Malabar Tenancy Act.

5. Advocate Sri Venugopal, appearing for appellants/ plaintiffs in S.A.610 of 1993, Advocate Sri Harikumar appearing for respondents who are appellants in S.A.109 of 1994 were heard.

6. The argument of Adv.Sri Venugopal is that courts

below did not properly consider Ext.B2 and omitted to take note of the fact that it is not a lease deed created by any Karanavan of the tarwad and is a unilateral document executed by Nanikutty Amma and her children and that too after Ext.A2 partition whereunder Krishnan Nair, husband of Nanikutty Amma and father of other executants of Ext.B2 who was the then Karanavan was permitted to reside in the building and in possession of the property. It was argued that when Ext.A1 provides that the property shall not be alienated, a lease cannot be created by a Karanavan or member of the tarwad and as no lease was created by a registered document by the Karanavan, contesting defendants cannot claim protection under Section 7(B) of the Act. It was argued that there is nothing in evidence to prove that the lease alleged to have been granted under Ext.B2 was accepted by the tarwad and no rent receipt was produced and courts below should not have accepted the lease set up by appellants and should have found that tak No.1 of plaint schedule property is also available for partition.

7. Adv.Sri Harikumar argued that evidence accepted by Land Tribunal establish that appellants in S.A.109 of 1994 were in possession of the property since the date of the lease and

therefore even if the lease was granted against the provisions of Ext.A1, they are protected by Section 7 of the Act. It was argued that as the contesting defendants were in possession of the property before 21.1.1961, they are entitled to fixity of tenure and item No.2 of plaint schedule property is also not available for partition.

8. On hearing the learned counsel, it is clear that courts below did not properly consider the evidence. Admittedly, both tak Nos.1 and 2 of the plaint schedule property were kept common when the tarwad properties were partitioned in 1913 under Ext.A1. Ext.A1 also provides that property kept in common shall not be alienated. In 1937, Krishnan Nair, the Karanavan who is none other than the husband of Nanikutty Amma and under whom contesting defendants claim right, separated from the tarwad. Ext.A2 also provides that plaint schedule property which was kept common under Ext.A1 shall be in the possession of Krishnan Nair and on his death it is to be in the possession of the next Karanavan of the tarwad. Ext.A2 was executed on 17.6.1937. Therefore it is clear from Ext.A2 which cannot be disputed by the contesting defendants, that plaint schedule property was in the possession of the tarwad in June

1937 and Krishnan Nair who continued possession of the property as Karanavan of the tarwad in view of the prohibition contained in Ext.A1 and A2 could not alienate the property even by a lease. It is thereafter Ext.B2 was executed.

9. Courts below wrongly assumed that Ext.B2 is a lease deed executed by the Karanavan of the tarwad. First appellate court granted the benefit of Section 7(B) of K.L.R Act holding that though Ext.B1 lease was created in violation of the provisions of Ext.A1 prohibiting such alienation, in view of Section 7(B), the lease is protected. Question is whether Section 7B of the Act is applicable to the facts of the case.

Section 7B reads:

> "Certain persons occupying lands under leases granted by incompetent persons to be deemed tenants:-(1) Notwithstanding anything to the contrary contained in any law, or in any contract, custom or usage, or in any judgment, decree or order of court, any person in

occupation of the land of another at the commencement of the Kerala Land Reforms (Amendment) Act, 1969, on the basis of a registered deed purporting to be a lease deed, shall be deemed to be a tenant if he or his predecessor-in-interest was in occupation of such land on the 11th day of April, 1957, on the basis of that deed, notwithstanding the fact that the lease was granted by a person who had no right over the land or who was not competent to lease the land.

(2)Notwithstanding anything to the contrary contained in any law, or in any contract, custom or usage, or in any judgment, decree or order of court, any

person who on the 11th day of April, 1957, was in occupation of the land of another and continued to be in occupation of such land till the commencement of the Kerala Land Reforms (Amendment)Act, 1969, shall be deemded to be a tenant if a court has delivered a judgment or passed an order before the date of publication of the Kerala Land Reforms(Amendment) Bill, 1968, in the Gazette that the occupation by such person was on the basis of an oral permission or an unregistered deed purporting to be a lease deed granted by a person who had no right over the land or who was not competent to lease the land".

First of all, Ext.B2 is not a lease deed executed by Ravunni Nair, who is shown as Karanavan of the tarwad. Ext.A2 shows that Karanavan of the tharawad at that time was Krishnan Nair. Therefore, in August 1937, Ravunni Nair in whose favour Ext.B2 was executed could not be the Karanavan of the tarwad. Moreover, Ext.B2 is a unilateral document executed by the wife and children of Krishnan Nair, who shall be in possession of the property in his capacity as the Karanavan as provided under Ext.A2. If the lease evidenced by Ext.B2 was accepted by Ravunni Nair or the Karanavan, there would have been a registered counter part to Ext.B2, accepting the lease. There is absolutely no evidence to prove the acceptance of Ext.B2. Ext.B2 therefore cannot be taken as a document by which a lease was created as provided under Section 7(B) of the Act. Though it is a registered document and was executed prior to 11.4.1957, as the lease was not created under Ext.B2, being only a document created by the executants alleging that there was a lease, contesting defendants are not entitled to claim protection under Section 7(B) of the Act. Moreover, though a lease granted by an incompetent person, by a registered document if created before 11.4.1957 was protected notwithstanding anything to the

contrary, contained in any law, or contract, custom, usage judgment, decree or order of the court, Section 7(B) does not protect a collusive transaction as held by the Division Bench of this court in **Ahammed V. Moideen and others(**1974 KLT 549)**.** Proved facts establish that when the properties were divided in 1913 and subsequently again divided in 1937 under Ext.A2, plaint schedule properties were kept common with a specific provision that it shall not be alienated. Ext.A2 also provides that Krishnan Nair, the husband of Nanikutty Amma, the executant of Ext.B2 shall be in possession of the property till his death and after his death the property shall be in the possession of the next Karanavan. It is three months after execution of Ext.A2 partition deed, Ext.B2 document was executed by the wife and children of Krishnan Nair. No further evidence is necessary to prove the collusive nature of Ext.B2. Therefore even if Ext.B2 was a document as provided under Section 7(B), protection cannot be claimed under the said document as it is a collusive transaction. Therefore finding of first appellate court that tak No.1 of the plaint schedule propety is not available for partition is not sustainable.

10. Even though appellants in S.A. 109 of 1994 claimed

that first appellate court should not have reversed the finding of Land Tribunal and the trial court that tak No.2 of the plaint schedule property is also not available for partition, on the facts the finding of first appellate court is perfectly correct. The lease set up in respect of tak No.2 is an oral lease. No evidence was adduced to prove the oral lease. First appellate court, on appreciation of evidence, entered a factual finding that contesting defendants are not entitled to the tenancy right in respect of tak No.2 also. In fact tenancy is claimed along with tak No.1, which is claimed under Ext.B2. It is already found that claim based on Ext.B2 is unsustainable. There is absolutely no evidence to prove the oral lease. But Ext.A2 establish that Krishnan Nair was permitted to be in possession of the common properties including tak No.2. The tenancy is claimed by his wife and children. There is no evidence of an oral lease or payment of rent. On the evidence, first appellate court rightly found that tak No.2 is also available for partition and the contesting defendants are not entitled to fixity of tenure, under the Act.

In the result, S.A.610 of 1993 is allowed. The preliminary decree passed by Sub Court, Tirur is modified holding that tak No.1 is also available for partition. Confirming the finding of

first appellate court that tak No.2 is also available for partition, S.A. 109 of 1994 is dismissed. No cost.

M.SASIDHARAN NAMBIAR, JUDGE

lgk/-

M.SASIDHARAN NAMBIAR, J

S.A.610 & 109/94

JUDGMENT

7.12.2007